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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 558

SEA GULL LUBRICANTS, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

ASHLEY M. VAN DUZER,
PETER REED,
ORRIN B. WERNTZ,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Sea Gull Lubricants, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled cause on June 7, 1943, in favor of respondent.

Opinion Below.

The opinion of the Court of Claims (R. 33) is reported in 99 C. Cl. 716 and in 50 Fed. Supp. 230.

Jurisdiction.

The judgment of the Court of Claims (R. 37) was entered on June 7, 1943. Motion for rehearing and for a

new trial (R. 37) was filed by petitioner on August 3, 1943, which motion was overruled (R. 37) on October 4, 1943. This petition was filed in this Court on or before January 4, 1944 (see Clerk's file mark). The jurisdiction of this Court rests on Sections 288 and 350 of the Judicial Code.

Statutes and Regulations Involved.

The pertinent parts of the Statutes and Regulations involved are set forth in the Appendix (*Infra*, pp. 15 and 16).

Statement.

The question presented by this petition is whether Section 601 (c) of the Revenue Act of 1932, reading:

> "There is hereby imposed upon the following articles sold in the United States * * * a tax at the rates hereinafter set forth * * *:
>
> (1) Lubricating oils, 4 cents a gallon; * * *."

applies to cutting fluids which are allowed to flow upon metal being cut in commercial machine tool operations.

Except for the ultimate finding of taxability, i. e., that the function performed by the fluids is lubrication and that they were thus lubricating oils (R. 33), petitioner accepts without reservation the findings of fact entered by the Court of Claims and made part of its judgment.

Facts.

Petitioner, a manufacturer and producer of cutting fluids, sold them through a subsidiary selling company to The National Acme Company and The Lamson & Sessions Company. Petitioner paid the taxes and separately invoiced the amount to Acme and Lamson, which each reimbursed petitioner. There are no procedural problems incident to passing on of the tax. The compound bought by Acme was

"Elaine Oil", a commercial form of oleic acid, a fatty acid derived from lard oil (R. 27). Lamson purchased "Clark's X Cutting Oil", a mineral-base cutting fluid compounded from mineral oil, animal fat, sulphur and chlorine (R. 27): Acme used the Elaine Oil in combination with chlorine and sulphur (R. 27). The cutting fluids ordinarily used in commercial machine tool operations are combinations of fatty oil, mineral oil, soluble oil, soap, soda, sulphur, chlorine, aliphatic compounds, phosphoric esters and water (R. 30).

Petitioner's Claim.

(1) The fluids were not "lubricating oil" under the statute or regulations.*

The point turns on whether cutting fluids perform a lubricating function in connection with machining metal, the Commissioner of Internal Revenue having since 1932 uniformly exempted oils capable of, but admittedly not used for, lubrication.

Summary of the Findings of the Court of Claims.

In its essentials the Court's findings may be summarized as follows:

(1) Claim for refund, asserting the same grounds of recovery as here, was filed and rejected by the Commissioner (R. 25-27).

(2) The fluids in each instance were used as cutting fluids in automatic screw machine operations. Both in the case of Acme and Lamson, the automatic screw machines were provided with separate lubricating oil systems in which entirely different oils (the tax on which has never been in controversy) were stored and circulated to lubricate the machines (R. 27-28). Every

*A constitutional point was made but is not presented here, the Court's findings not being adequate to admit of its consideration.

effort is made to exclude the cutting oil from the bearing surfaces, which are sealed off so far as possible because cutting oil damages the bearings by corrosion and otherwise (R. 27-28). The cutting fluids are applied by flooding them over the work at and surrounding the point of the cut. The flooding is ordinarily achieved by having jets of oil directed at the cutting area in a continuous stream of from 10 to 80 gallons per minute (R. 31). The cutting is accomplished by plastic deformation of the crystals in the metal being cut under extreme pressure and at high temperatures. The operation is not in the nature of a splitting and there is no crack or opening ahead of the point of the tool (R. 30). Within the cutting area there are no cracks or space other than of molecular dimensions in terms of millionths of an inch and in the area where the cutting takes place pressures of from 100,000 to 300,000 pounds per square inch and temperatures of 800° to 1200° Fahrenheit exist. Oil in fluid form will not withstand such pressures and temperatures except possibly momentarily (R. 30-31). A pressure of 1,000 pounds per square inch is an extremely heavy load for lubricating oil films, and the temperature destruction point of an oil film is less than the minimum temperature limits involved.

(3) The functions served by the cutting oils are (1) to cool the work piece and the tool, (2) to serve as an anti-weld or anti-seizure substance whereby friction is reduced between the work piece and the tool and the chip and the tool, (3) to wash away the chips, and (4) to prevent rust (R. 31).

(4) The pertinent mechanics of metal cutting are that metal surfaces, including that of the work piece and of the tool, are normally covered with adsorbed films [1] of molecular thickness. Were this not true and were the metal surfaces chemically clean, i. e. nascent, they would weld together immediately upon being

[1] I.e., an attribute of or integral part of.

placed in contact. As the cutting operation continues both surfaces are robbed of the adsorbed film. Thus, there is a tendency to weld or seize. The cutting fluids carry additives (such as sulphur or chlorine) and these additives, *the fluid or oil being a mere carrier*,[2] set up chemical reactions which restore the adsorbed film and prevent this welding or seizure. Ordinary mineral lubricating oils such as are used in fluid film lubrication are not generally satisfactory as cutting oils, and similarly, cutting oils are not generally satisfactory for lubricating moving parts of machinery (R. 31-32).

(5) "The commonly understood conception of lubrication is that which takes place when a film of oil is interposed between adjacent and relatively moving parts with the result that there is actual prevention of contact between the opposing surfaces, thus eliminating or reducing frictional resistence". This, in its simplest form, may be illustrated by ordinary journal and bearing lubrication. Such lubrication is almost, if not entirely, mechanical or physical (R. 28).

(6) Whatever physical or mechanical action, that is, fluid film lubrication takes place, if any, is of a minor or incidental character (R. 32).

Question Presented.

(1) Are the cutting fluids as above described and performing the function above set forth "lubricating oil" within the meaning of Section 601 (c) of the Revenue Act of 1932, and the Regulations thereunder?

Specification of Errors to Be Urged.

The Court of Claims erred:

(1) In deciding and determining that Section 601 (c) of the Revenue Act of 1932 applied to and rendered taxable cutting fluids above described.

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[2] All emphasis is supplied by counsel.

Reasons Relied On for the Allowance of the Writ.

I.

The decision of the Court of Claims conflicts with the controlling principles applied in decisions of this Court.

Old Colony R. R. Co. v. *Commissioner*, 284 U. S. 552;
DeGanay v. *Lederer*, 250 U. S. 376;
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364;
Caminetti v. *U. S.*, 242 U. S. 470;
U. S. v. *First National Bank*, 234 U. S. 245;
Edwards v. *Slocum*, 264 U. S. 61;
Maillard v. *Lawrence*, 16 How. (57 U. S.) 251;
White v. *Aronson*, 302 U. S. 16;
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 489.

II.

The Court of Claims has decided an important question of general law in an untenable way and in conflict with the weight of authority.

Here petitioner relies on the cases above cited as well as
Mennen Co. v. *Kelley* (C. C. A. 3rd), 137 Fed. (2) 866;
Philadelphia Storage Battery Co. v. *Lederer* (D. C. Pa.), 21 Fed. (2) 320;
Feitler v. *Harrison*, 126 Fed. (2) 449 (C. C. A. 7th);
American LaFrance Fire Engine Co. v. *Riordan* (C. C. A. 2nd), 6 Fed. (2) 964.

The Court of Claims found that the cutting fluids served four distinct functions; to cool the work; to serve as an anti-weld or anti-seizure substance; to wash away the chips; and to prevent rust (R. 31).

Only the anti-seizure function requires discussion. The Court has found (R. 31-32) that the prevention of welding is accomplished as follows: Metal surfaces are normally covered with films of molecular thickness, i. e. adsorbed

films. As the metal is ruptured, nascent, that is, chemically clean metal is exposed. The nascent surface of the work piece robs the tool of its adsorbed film and these two chemically clean surfaces come into contact. The tendency of such surfaces is to seize or weld. The additives in the cutting fluids set up a chemical reaction which replaces either constantly or intermittently the adsorbed films by new compounds, such as oxides or chlorides, having a shear strength less than the metal being cut. This reaction takes place at the very point of cutting, where high pressures and temperatures prevail. The temperatures are so high, i. e. 800 to 1200 degrees Fahrenheit, that fluid oil films will not withstand them (R. 31). Similarly pressures are so great, i. e. 100,000 to 300,000 pounds per square inch, that an oil film would break down. A pressure of 1,000 pounds per square inch is considered an extremely heavy load for a film of oil (R. 31). The Court specifically refused to find that there is lubrication in a mechanical sense, saying,

> "Whatever physical or mechanical action, that is, fluid film lubrication, takes place, *if any*, is of a minor or incidental character, occurring only at the beginning of the operation, or at points some distance from the point of the tool" (R. 32).

The Court specifically finds that the fluids do not themselves accomplish the chemical function. That is accomplished by the additives, i. e. sulphur or chlorine in most instances, and the oil is only a carrier (R. 32):

Petitioner's point is that this chemical function cannot successfully be claimed to be lubrication.

(a) *The Statute, Committee Reports and the Regulations.*

The statute can be left with the mere statement that nothing in it aids in determining the scope which Congress intended to give to the words "lubricating oil". It is thus

fair to assume that Congress intended those words in their ordinary and not a strained sense.

The proceedings of the Congressional Committee strongly suggest that the statute was intended to apply only to lubrication as ordinarily understood. That resort may be had to those proceedings is indicated by *U. S.* v. *Monia*, 317 U. S. 424.

Congress was, in the main, enacting a counterpart of the gasoline tax and was thinking primarily in terms of motor oil. At one point the Bill contained a definition of viscosity ratings based on automobile oil usage, which was eliminated probably because the automobilist could evade the law by mixing oils of a viscosity higher and lower than those defined by the statutes. When the Bill was remanded to the House, Mr. Crisp of the Committee on Ways and Means submitted a report recommending its passage in which he stated that

> "The grades of lubricating oil taxed at the rate of 4¢ a gallon are those suitable for use in an internal combustion engine." (Internal Revenue Bulletin, C. B. 1939-1, Part 2, page 482).

See also H. R. 10236 (H. R. R. No. 708, 72nd Congress, First Session, Union Calendar No. 123).

The Regulations are important only because they show that the Commissioner has never adopted a clear, uniform and consistent rule for the taxation of lubricating oils. His first regulation, that of June 21, 1932 (See Appendix, p. 15 infra) probably contemplated taxation according to potential, rather than actual, use, but in less than two months, on July 16, 1932 the regulation was amended to exclude oils having both lubricating and non-lubricating uses if put into a channel of consumption or distribution for a non-lubricating use and under a name identifying it for such use (these conditions have been met in the

present case), and the manufacturer obtains a certificate of exemption. No certificates were secured in this case because the Commissioner refused to permit their use. (See Finding of Court of Claims, R. 26.)

In 1934 the regulations were simplified so as to include oils "sold as lubricating oils and all oils which are sold and used for lubrication."

The only informal ruling is Informal Ruling No. 78 of August 23, 1932, and its companion ST-505, XI-2, C. B. 448, 1932. These are merely sales tax rulings and do not have the force of law and are not entitled to more than passing consideration.

Radiant Glass Co. v. *Burnet*, 54 Fed. (2) 718 (Ct. App. D. C.);

Pictorial Review Co. v. *Helvering*, 68 Fed. (2) 766, 768 (Ct. App. D. C.);

Helvering v. *New York Trust Co.*, 292 U. S. 455, 468;

Biddle v. *Commissioner*, 302 U. S. 573.

The Commissioner himself states in his bulletins that such rulings are merely for the information of taxpayers and have none of the true force or effect of Treasury Decisions.

The Commissioner's literature is full of informal rulings, frequently inconsistent, dealing with slushing oil, crank case oil, refrigerator oil, fish oils, petrolatum, core oils, neatsfoot oil and dozens of others; e.g., grinding oils are not taxable, although grinding differs in no respect from any other metal cutting, and the Court of Claims so found (R. 29).

Thus, the Court of Claims was free to interpret the statute unaffected by any considerations of administrative interpretation, and it is to be noted that the Court did not seek so to place its reliance. *Burnett* v. *Chicago Portrait Co.*, 285 U. S. 1, 16, 20.

(b) *The Court of Claims disregarded the concept that statutory language should be given its ordinary meaning in the absence of indicia to the contrary.*

The Court of Claims accurately defined lubrication in its Findings (R. 28). It said:

> "The commonly understood process of lubrication is what takes place when a film of oil is interposed between adjacent and relatively moving parts with the result that there is actual prevention of contact between the opposing surfaces, thus eliminating or reducing frictional resistance. In its simplest form, it is illustrated by the ordinary journal and bearing * * *."

This is not what takes place in metal cutting. The Court said in its Findings (R. 32):

> "Whatever physical or mechanical action, that is, film lubrication, takes place, if any, is of a minor or incidental character, occurring only at the beginning of the operation, or at points some distance from the point of the tool."

The Court of Claims accurately stated what takes place in a metal cutting operation. The Court excluded the formerly held belief that as the tool enters the work piece there is a splitting ahead of the point of the tool into which cutting fluids might penetrate (R. 30). It fully recognized that there was no crack or space other than of molecular dimensions in terms of millionths of an inch at or around the cutting area (R. 30). The Court also found that oil, as oil, could not withstand either the temperatures generated or the pressures exerted in the cutting area (R. 31). Then follows the finding that what takes place is a chemical restoration of molecular films which are parts of the tool and work piece respectively.

To characterize any such function as lubrication is to deny truth. A citizen has a right to know the objects

upon which he will be taxed, and it is within the power of Congress to define and describe at will, so long as constitutional limitations are not transcended. If Congress has not used words adequate to include cutting fluids, then it must inevitably be said that Congress did not intend that they should be taxed. No power to tax them was lacking. The ordinary citizen, when he thinks of lubrication, thinks not in terms of water solutions or compounds, performing a peculiar chemical function in molecular space, but rather of the film of oil in his automobile engine; his lawn mower; his wife's sewing machine; in the journals and bearings at the shop or factory where he works. Congress has used the words with which the ordinary citizen is familiar.

When this has been said, the entire lawsuit in this posture of the case has been stated.

The ultimate conclusion of the Court of Claims flies in the face of its Findings of Fact and is repugnant to them. Cf. Sec. 288 Judicial Code, 28 U. S. C. A. 3rd paragraph.

The decision of the Court of Claims immediately runs afoul of this Court's decisions, such as *Old Colony R. R. Co.* v. *Commissioner*, 284 U. S. 552, rejecting the Commissioner's contention that the word "interest" was used in the Revenue Laws in a technical sense rather than as rent for money, as the ordinary taxpayer understands the term; *DeGanay* v. *Lederer*, 250 U. S. 376, rejecting an alien taxpayer's argument that because he lived elsewhere than in the United States, his holdings here were not "property owned" in the United States; *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, rejecting the Commissioner's argument that a lessee's interest in mining property was not to be included within the word "property" for depletion purposes, this Court saying:

> "And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, nar-

> row, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."
>
> Cf. Mr. Chief Justice Holmes, in *Edwards* v. *Slocum*, 264 U. S. 61;
>
> "* * * 'algebraic formulae are not lightly to be imputed to legislators' * * *."

Taxation deals necessarily with realities and not with fine-spun theories. *Helvering* v. *Hallock*, 309 U. S. 106. Thus, shawls are "wearing apparel" even though they may be used as throws for pianos. *Maillard* v. *Lawrence*, 16 How. (57 U. S.) 251.

When a taxpayer asked this Court to define candy in an excise tax case as not including sweet milk chocolate, this Court felt that to agree would do violence to common sense. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 489.

Other illustrations of the application of this well-known rule of statutory construction are to be found in *Mennen Co.* v. *Kelley*, 137 Fed. (2) 866 (C. C. A. 3rd); *White* v. *Aronson*, 302 U. S. 16, in which this Court decided that jig saw picture puzzles were not taxable as games; *Philadelphia Storage Battery Co.* v. *Lederer*, 21 Fed. (2) 320, 321, 322; *Feitler* v. *Harrison*, 126 Fed. (2) 449 (C. C. A. 7th); and *American LaFrance Fire Engine Co.* v. *Riordan*, 6 Fed. (2) 964 (C. C. A. 2nd).

These considerations should find complete acceptance where the sovereign is dealing with the citizen in tax matters. Considerations of governmental grace then enter into the problem. So stated this Court in *Eidman* v. *Martinez*, 184 U. S. 583, where it was said that it is an old and familiar rule applicable to all forms of taxation and "particularly special taxes" that the sovereign is bound to express its own intention to tax in clear and unambiguous language.

(c) *Presumption if the statute is ambiguous.*

The decision of the Court of Claims likewise ignores the ordinary rule that where ambiguities exist, they should be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, at p. 153, and *Old Colony R. R. Co.* v. *Commissioner*, *supra*. Perhaps there has been too widespread a reliance upon the rule stated as above. (Cf. *White* v. *U. S.*, 305 U. S. 281, a case, however, dealing with an exception to or exemption from the tax).

The principle is sound, however, and as respects this case may be stated thus: Congress in an excise tax law has it within its power to select language fairly describing the article with respect to which the tax is to be applied. If Congress fails to perform that function, then clearly, to the extent that presumptions or inferences must be brought into play, none should be indulged to extend congressional language to anything which it does not cover.

(d) *Minor and Incidental Character of Alleged Lubrication Function.*

In no aspect is the alleged lubricating function sufficient quantitively to warrant taxability. The Court has found that cutting fluids are poured upon the work by flooding the work in a continuous stream of from 10 to 80 gallons per minute (R. 31). The Court has also found that what causes the chemical action is the additives, i. e. chlorine, sulphur, etc., in the fluid. The oil is but a carrier. Admittedly only the tiniest amount of the compound can function as an anti-weld. Obviously, the huge amounts of the fluid poured upon the work are for purposes of cooling, washing away chips, etc. Under these circumstances it seems entirely reasonable that taxability should be determined by the chief use rather than by infinitesimal use, even if, contrary to fact, it be deemed a lubricating use. It is of no importance that an understanding of what cutting fluids

actually accomplish is comparatively new to those engaged in the metal cutting business, and that some have advertised their products as lubricants. The taxability of the product is not to be determined by the innocent misrepresentations of the seller. Cf. *Benziger* v. *U. S.*, 192 U. S. 38.

Conclusion.

The Court, we submit, decided the case in a way not in accord with the applicable decisions of this Court, and in a way untenable and in conflict with the weight of authority. See Rule 38-5 of this Court.

That the case is of importance is not open to doubt. Its decision by this Court would serve as a guide to the entire industry. Its outcome is of importance to all users of cutting fluids.

There is no dispute of fact and the legal questions are clear-cut. It is submitted that the case is one which warrants admission to this Court for hearing upon the general docket.

Respectfully submitted,

Ashley W. Van Duzer,
Peter Reed,
Orrin B. Werntz,
Attorneys for Petitioner.